Community Care and Assisted Living Appeal Board

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DECISION NO. 2014-CCA-003(a)

In the matter of an appeal under section 29 of the *Community Care and Assisted Living Act* S.B.C. 2002, c.75

BETWEEN:	CM, Licensee, (operating Discovery Planet Child Centre)	**APPELLANT**
AND:	Dr. Charmaine Enns, Medical Health Officer, Island Health	**RESPONDENT**
BEFORE:	Alison H. Narod, Vice-Chair	
DATE:	Conducted by way of written submissions concluding on Friday, October 24, 2014	
APPEARING:	For the Appellant: Self-represented For the Respondent: Robert Macquisten, Counsel	

PRELIMINARY DECISION: STAY APPLICATION

[1] This decision deals with the Appellant's request for a stay of the Respondent's decision to cancel her license to operate Discovery Planet Child Centre, a licensed group child care facility (the "Facility"). The Respondent's decision to cancel the license is effective October 26, 2014. The Appellant asks the Community Care and Assisted Living Appeal Board (the "Board") for a temporary suspension of the cancellation decision in order for her to continue to operate the Facility pending a hearing and the determination of her appeal to the Board against the Respondent's decision to cancel her License.

[2] On the evidence before me, I have concluded that a conditional stay would not risk the health or safety of a person in care.

[3] The Board's authority to stay the cancellation decision and to attach terms or conditions to its order is found in sections 15, 26(9) and 50(2) of the *Administrative Tribunals Act* ("*ATA*") and section 29(6) of the *Community Care and Assisted Living Act* (the "*Act*"). Sections 15, 26(9) and 50(2) of the *ATA* empower the Board (or the Board Chair or her delegate) to make interim orders and to attach terms or conditions on orders. Section 29(6) of the *Act* provides that the Board may not stay or suspend a decision unless it is satisfied, on summary application, that doing so would not risk the health or safety of a person in care.

[4] Notably, the Board has no discretion under section 29(6) of the *Act* to stay a decision, unless it is satisfied that a stay "would not risk the health or safety of a person in care". In considering an application for a stay, the Board must make the determination on "summary application". This means that the application must not be turned into a full review of the case on the merits and, if the determination cannot be made without the need for conducting in essence a full review of the merits, then it would not be appropriate to grant a stay.

[5] I have the following materials before me:

1. A Notice of Appeal dated October 21, 2014 appending two medical letters from Dr. Larry M. Ness, both dated September 1, 2014.
2. An Application for a Stay, dated October 23, 2014.
3. A Response to Application for Stay Pending Appeal, dated October 24, 2014, appending:

   Tab 1: Final Facility Status Report dated July 29, 2014 (without Appendices)

   Tab 2: Letter of the Medical Health Officer dated August 1, 2014, containing notice of the Medical Health Officer's intention to cancel the Facility's license

   Tab 3: Appellant's Response received September 1, 2014 and dated August 25, 2014

   Tab 4: Decision of Medical Health Officer dated September 26, 2014, enclosing the Final Decision and Reasons of the Medical Health Officer, undated

   Tab 5: 2009 BCCCALAB 8

   Tab 6: 2010 BCCCALAB 5

   Tab 7: 2013-CCA-002(a)

   Tab 8: *Community Care and Assisted Living Act* and Child Care Licensing Regulation 332/2007 excerpts

   Tab 9: Director of Licensing Standards of Practice Safe Play Place, eff. December 10/07

[6] I wish to emphasize that this decision has been made based on the materials submitted as part of the stay application solely for the purposes of determining whether the cancellation decision should be stayed pending disposition of the appeal. It is not a determination or reflection on the merits.

[7] In brief, the issue on this summary application is whether the stay "would not risk the health or safety of a person in care".

Facts

[8] On November 4, 2008 Discovery Planet Child Centre was licensed as a Group Child Care (30 months to School Age) with a maximum capacity of 20 children. The complement of children is presently near maximum capacity.

[9] The Appellant Licensee, CM, was the original Facility Manager when the license was issued.

[10] Medical evidence indicates that the Appellant has a congenital hearing impairment that limits her ability to clearly hear speech and other sounds, but does not render her 100% deaf. She uses hearing aids and other assisted listening devices which enhance her ability to hear. Because she processes receptive communication using her visual sensory system, she requires instructions to be communicated to her in writing.

[11] In addition to being a qualified Early Childhood Educator, the Appellant has a Bachelor of Arts degree in writing and has undertaken post-graduate studies in Inter-Cultural Communications and in Counseling. Additionally, she has continued to take courses in Early Childhood Education and other courses relating to communication and management skills.

[12] The following conditions presently apply to the Appellant's license:

(a) On or before November 4, 2008, in light of her hearing impairment, the Appellant agreed that:

- For the purposes of staff to child ratio [CM] can care for no more than four children by herself.
- The Licensee is to provide emergency and communication equipment to ensure that all staff can meet the needs of children in care. Specifically, equipment must be available to enable hearing impaired staff to be aware of and respond to emergencies.

(b) On May 10, 2012, the Respondent required that:

1. A Facility Manager, approved by Licensing, must be working at the facility within 30 days of the Medical Health Officer final decision. The Facility Manager will be responsible for the day-to-day operation of the facility including but not limited to:
    a. Supervision of employees including scheduling, hiring, performance monitoring and termination;
    b. Program of activities;
    c. Supervision, guidance and discipline of children; and
    d. Record keeping for employees, children and facility.
2. [CM] will be removed from the Community Care Facility Licence as Facility Manager and will not be considered to meet the requirements under the *Community Care and Assisted Living Act* as the facility Manager for Discovery Planet Child Centre until the following conditions are met:
    a. An experienced child care Facility Manager * of a licensed Group Child Care (30 Months to School Age) provides written confirmation to the Medical Health Officer that she/he has directly supervised [CM] (including the number for the hours that were supervised and time period); and

b. She/he has determined that [CM] has demonstrated:

i. An understanding of the *Community Care and Assisted Living Act* and the Child Care Licensing Regulation;

ii. Skills and abilities to ensure the health, safety and well-being of 30 Months to School Age children; and

iii. Integrity in all of her professional relationships.

3. *The experienced child care Facility Manager must be approved by the Medical Health Officer prior to [CM] working under this individual's direct supervision. This individual must have sufficient experience managing a licensed Group Child Care (30 Months to School Age) facility to complete an assessment of [CM].

(collectively, the "May 10, 2012 Conditions")

[13] There is no dispute that the Appellant has not been in compliance with paragraph 1 of the May 10, 2012 Conditions since late December 2013. Nor has the Appellant completed the conditions in sub-paragraphs (a) and (b) of paragraph 2. (In this stay application, however, I need not determine whether the Appellant has the skills, ability and character to be an approved Facility Manager.) The Appellant maintains that she has made efforts to comply with the May 10, 2012 Conditions. Among other things, she says she has been constantly advertising for a suitable Manager, but there is a shortage of qualified Early Childhood Educators.

[14] A detailed description of the efforts by the Appellant to find an acceptable Facility Manager for the premises following the imposition of the May 10, 2012 Conditions is set out at pages 11 to 16 of the Final Facility Status Report dated July 29, 2014, pages 2, 6 and 7 of the Appellant's August 25, 2014 Response to the Respondent's Facility Status Report and page 1 of the Appellant's October 23, 2014 Application for a Stay.

[15] The Appellant was advised by letter dated July 24, 2012 that Licensing would continue to monitor her compliance with the terms and conditions on the Facility License. According to a Final Facility Status Report dated July 29, 2014, Licensing conducted 18 inspections between October 5, 2012 and January 30, 2014.

[16] Below, I address salient historical events.

[17] Despite paragraph 1 of the May 10, 2012 Conditions, the Appellant did not hire a Facility Manager approved by Licensing within 30 days of the condition being imposed.

[18] On October 15, 2012, the Medical Health Officer (the "MHO") informed the Appellant of her intention to suspend the Appellant's license due to non-compliance with the May 10, 2012 Conditions 1 and 2, as the Appellant was continuing to perform the duties of Facility Manager and had not been supervised by a qualified Early Childhood Educator.

[19] On October 21, 2012, the Appellant proposed that Gayle Hartling be the Facility Manager. Licensing approved Ms. Hartling as Facility Manager on November 2, 2012 and she continued to work in that capacity until March 26, 2013.

[20] On December 5, 2012, an exemption to section 18 of the Regulation for a manager to manage two different locations was approved by Licensing. This is some evidence that Licensing had confidence in the Facility's operation at that time.

[21] On December 21, 2012, Licensing issued a Facility Status Report Update indicating that the Appellant had complied with the May 10, 2012 Conditions as of December 10, 2012.

[22] On January 17, 2013, the MHO advised the Appellant that she had decided to rescind her decision to suspend the Appellant's license.

[23] On January 31, 2013, during Ms. Hartling's tenure as Facility Manager, Licensing received an anonymous complaint. As a result, Licensing conducted an investigation in which it found that the Appellant had implemented behavioral guidance strategies inappropriate for the ages of children in care. She had, on some occasions, fulfilled the role of Facility Manager and, on three occasions, had left Early Childhood Educators alone to supervise children in care.

[24] Note is made in the materials that the Facility Manager appointed subsequent to Ms. Hartling (Sharon Brisch) later provided an appropriate health and safety plan to address the contraventions of the Regulation and statute found during Licensing's investigation. This is some evidence that the contraventions had been resolved.

[25] Shortly after Ms. Hartling's departure in late March 2013, the Appellant was able to find and propose Sharon Brisch as the new Facility Manager. Ms. Brisch was approved by Licensing on or about April 3, 2013 and she continued in that capacity until December 20, 2013, when she resigned for health reasons. There is no indication in the materials before me that there were any complaints or contraventions during this time period.

[26] Following Ms. Brisch's departure in late December 2013, no further Facility Manager has been approved to take her place. However, there is evidence in the materials that the Appellant has made efforts to find a substitute, albeit without success. The Appellant contends that she continues to search for a replacement, but the search has been challenging. In this regard, I note, without commenting on the merits, that the Appellant most recently proposed that the Facility's Assistant Manager become the Facility Manager, but Licensing did not approve this proposal.

[27] In any event, from approximately December 20, 2013 to date, the Appellant's staff have worked without an approved Facility Manager.

[28] In the meantime, two further complaints were received about the Facility. I have not been provided with documentation relating to the investigation of the complaints, although references have been made to them in the materials before me. On May 2, 2014, Licensing received a complaint relating to the Appellant, alleging a lack of staffing skills, care plans not being implemented, and inappropriate programming and guidance practices.

[29] Additionally, on June 11, 2014, an anonymous complaint was made that children in care had been subjected to emotional abuse when they observed a

verbal altercation between the Appellant and a worker supplied by another agency to support a disabled child.

[30] Licensing conducted an investigation, obtained the Appellant's response to its Summary of Apparent Findings and concluded:

- [CM], Licensee, acted in the capacity of Facility Manager directing a Support Worker and therefore did not comply with Condition 2 on the facility licence that stated "[CM] will be removed from the community care facility licence as facility manager and will not be considered to meet the requirements under the *Community Care and Assisted Living Act* as the Facility Manager for Discovery Planet Child Centre until Conditions 2(a) and 2(b)(i)(ii)(iii) are met." Therefore Section 7(1)(b)(i) of the *Community Care and Assisted Living Act* was contravened.
- Two children in care were subjected to emotional abuse as [CM], Licensee, and [NO], Support Worker, engaged in a verbal altercation in front of them. Therefore, there was contravention to Section 52(2) of the Child Care Licensing Regulation related to emotional abuse.
- The Licensee did not ensure that Licensing was notified regarding a Reportable Incident within 24 hours. Therefore, there was contravention to Section 55(2)(a) of the Child Care Licensing Regulation (Appendix 51).

[31] Licensing determined that, during the 18 inspections it conducted between October 5, 2012 and January 30, 2014, there had been contraventions to section 7(1)(b)(i) of the *Act*, sections 19(1)(a)(b)(f), 37(3)(b), 52(1)(b) and 57(2)(d) of the Regulation, as well as the Director of Licensing Standards of Practice, Safe Play Spaces.

[32] The MHO appears to have adopted Licensing's findings and ultimately decided to cancel the Facility's license.

[33] The Appellant vigorously opposes and appeals the MHO's Decision.

Reasons

[34] The task before me is to determine whether or not I am satisfied, on this summary application, that the requested stay would not risk the health or safety of a person in care during the term of the stay. This necessarily requires some consideration of whether or not there is presently such risk.

[35] In reaching my conclusion, I am entitled to consider whether appropriate conditions would mitigate any such risk during the term of the stay.

[36] In circumstances such as these, it is useful to consider the length of time before the matter will be heard and determined, as well as whether or not the health and safety of a person in care will be a risk in the event a stay of that length of time is granted. I am advised that the appeal could be heard within the next two or three months, depending on the parties' availability.

[37] Below, I will set aside the issue of compliance with the May 10, 2012 Conditions briefly and return to it in due course.

[38] The contraventions that do not flow from non-compliance with the May 10, 2012 Conditions appear to me, on the materials, to relate to incidents that have either already been remedied, dealt with or are not of a continuing nature. Notably, the circumstances regarding the two complaints of May 23 and June 11, 2014 are not described in the materials before me as high risk, they have not recurred, and a key person involved in those circumstances is no longer present at the workplace. No more recent inspection reports have been supplied and therefore I am unable to conclude that there are continuing contraventions or new ones at the Facility, other than those relating to non-compliance with the May 10, 2012 Conditions. Such inspection reports may have contained some level of risk assessment but, as noted, I do not have them before me.

[39] On the other hand, the information presently before me indicates that the failure to employ a Facility Manager approved by Licensing is a continuing matter.

[40] Licensing has expressed concern that the Appellant failed to comply with the May 10, 2012 Conditions for approximately seven months after they were imposed. However, once she employed Ms. Hartling, Licensing acknowledged that fact and the MHO rescinded her preliminary decision to cancel the Appellant's license. It is therefore arguable that Licensing tolerated or condoned the level of supervision that subsisted at the Facility during the seven month lapse to some extent and, in any event, did not find that lapse to put the children at such risk during that period of time so as to warrant summary action, for example, under section 14, or at some earlier date than it did.

[41] The Appellant then complied with the May 10, 2012 Conditions by employing approved Facility Managers for somewhat in excess of one year, ending December 20, 2013 (with the exception of a few weeks while finding a replacement Facility Manager).

[42] However, most of 2014 has now passed without the Appellant hiring a new, approved Facility Manager, although the evidence before me indicates that efforts have been made to find a replacement during that period. Again, I note that Licensing did not take immediate steps to cancel the Appellant's license after the departure of the second approved Facility Manager. This suggests that there was either no risk or not sufficient risk to the children in the particular circumstances of this case to warrant a more timely response.

[43] At the hearing of this matter on the merits, the Appellant will bear the onus of proving that the decision under appeal was not justified. It may be difficult for the Appellant to succeed on this. However, I am unable to say with confidence that the appeal may not succeed in some significant respect, for example, if the Appellant is successful in securing a substitute or alternative remedy. She may, for instance, find an approved Facility Manager, establish that a proposed manager should have been approved, or otherwise establish that there are alternative means or methods of ensuring the Facility has the equivalent resources of a Facility Manager.

[44] I note that the Facility has not been closed. It is not a small daycare. The Appellant is not the only person working at the Facility. The Facility has a complement of children that is near its maximum capacity of 20. The Appellant

advises that as many as 40% are foster children, some are from economically or socially challenged homes, and at least one has special needs.

[45] Closure of the Facility pending the outcome of appeal will cause disruption and, possibly, harm to the children and their relationships with their caregivers at the Facility. In the event the appeal succeeds in some material respect, closure and the attendant disruption and harm may ultimately be unnecessary. In this particular case, the better approach would be to preserve the status quo, subject to restrictive conditions.

[46] In the circumstances, it is my view that a stay with appropriate, restrictive conditions would mitigate any risk pending determination of this appeal. Those conditions are set out below:

1. There shall be no new or additional enrolments in the Facility.
2. The Appellant will make her best efforts to comply with the May 10, 2012 Conditions.
3. The Respondent will monitor the Appellant's compliance with the *Act* and Regulation.
4. The Appellant will fully cooperate with all monitoring by the Respondent.
5. The Appellant will comply strictly with this Order.
6. Subject to these terms, the Appellant will ensure that the Facility is in full compliance with the *Act* and Regulation.
7. The Appellant will comply with all Board case management and scheduling requirements relating to this Appeal.
8. The parties will accommodate the scheduling of an early hearing date of the appeal.
9. The stay will operate until the appeal is disposed of by a Panel or until further order of the Board. For clarity, without limiting the rights of either party, the Respondent is at liberty to apply to the Board to terminate or amend the Order if it has reason to believe that the conditions of the stay are not being complied with in a material way.
10. In view of the medical evidence that has been supplied by the Appellant, the Respondent shall provide any instructions to the Appellant in writing or, where instructions are provided orally, those instructions will be promptly confirmed and provided to her in writing.

"Alison Narod"

Alison H. Narod, Vice Chair
Community Care and Assisted Living Appeal Board

October 30, 2014